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In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA, ET AL.,
PETITIONERS

v.

CURTIS W. MCGHEE, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a prosecutor is subject to personal liability under 42 U.S.C. 1983 for a wrongful conviction and incarceration where the prosecutor allegedly procured false testimony during the criminal investigation and then introduced that same testimony against the criminal defendant at trial to obtain a conviction.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the circumstances in which federal officers can be liable in a civil action for alleged violations of constitutional rights. The United States also has a substantial interest in the rules of pleading and proof in civil actions against federal officers. Although this case involves a claim against state prosecutors under 42 U.S.C. 1983, this Court has invoked its Section 1983 jurisprudence in cases involving the implied cause of action against federal officers for the deprivation of constitutional rights, recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

STATEMENT

1. In 1977, John Schweer was shot and killed while working as a security guard at an automobile dealership in Council Bluffs, Iowa. Pet. App. 4a, 24a. Two Council Bluffs police detectives led the murder investigation. Petitioners Joseph Hrvol and David Richter, both prosecutors for Pottawattamie County (which embraces Council Bluffs), were involved in the investigation. *Id.* at 3a-4a, 25a, 81a-82a.

Council Bluffs authorities came to believe that one Kevin Hughes had information about the Schweer murder; on questioning, Hughes eventually alleged that respondents Curtis McGhee and Terry Harrington murdered Schweer. Pet. App. 6a-7a, 28a-32a. Respondents were then charged with the murder, and prosecuted by petitioners.[1] Respondents were found guilty of first degree murder in separate trials at which Hughes testified against them. Each was sentenced to life in prison. *Id.* at 7a, 35a-36a.

In 1999, Harrington obtained previously undisclosed reports from the Council Bluffs Police Department, which pointed to the existence of another suspect for the murder. Harrington pursued state post-conviction relief based on this failure to disclose exculpatory evidence, and the Iowa Supreme Court ultimately vacated his conviction. Pet. App. 8a, 38a-39a. The State declined to retry him, and all charges were dismissed. McGhee reached an agreement with the district attorney to enter an *Alford* plea to second degree murder, and to be resentenced to time already served. *Id.* at 8a, 43a-44a.

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[1] "Petitioners" in this brief refers to Hrvol and Richter. The record is not entirely clear as to whether both Hrvol and Richter participated in the prosecutions of both respondents; this brief assumes they did.

2. Respondents brought actions in the United States District Court for the Southern District of Iowa against petitioners and others, pleading (as relevant here) several claims under 42 U.S.C. 1983. Respondents claimed, *inter alia*, that in investigating Schweer's murder, petitioners coerced Hughes to implicate respondents in the murder; disregarded obviously false details of Hughes' account and coached him to give an account more consistent with known facts; and coerced false witness testimony to corroborate Hughes' story. See Pet. App. 30a-35a.

3. Petitioners moved for summary judgment on the grounds of absolute and qualified immunity, which the district court denied in relevant part. The court first held that petitioners are not protected by absolute immunity for coaching and coercing witnesses to offer false or fabricated evidence during the investigation, because petitioners lacked probable cause to arrest either respondent for any crime, Pet. App. 59a-73a, and under *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 273 (1993), "prior to the establishment of probable cause to arrest, a prosecutor generally will not be entitled to absolute immunity," Pet. App. 55a. The district court concluded that petitioners are, however, entitled to absolute immunity when initiating criminal proceedings and presenting the State's case. *Id.* at 78a-80a.

The district court also rejected Hrvol's and Richter's claims to qualified immunity. The court saw no reason why a prosecutor who manufactures evidence that he subsequently uses at trial would be immune under Section 1983, but a police officer who does the same would be liable. The district court noted that *Zahrey* v. *Coffey*, 221 F.3d 342 (2d Cir. 2000), perceived the same problem, and resolved it by holding that a prosecutor's fabrication

of evidence gives rise to Section 1983 liability, so long as the use of that evidence to commit a deprivation of liberty is reasonably foreseeable and the evidence is, in fact, so used. Pet. App. 107a-108a.

4. On interlocutory appeals from the denials of immunity, the court of appeals affirmed in relevant part. The court agreed with the district court that petitioners are not entitled to absolute immunity for actions taken before they had probable cause to arrest respondents. Pet. App. 11a-12a. As to qualified immunity, the court of appeals also embraced *Zahrey*, and held that petitioners violated respondents' "substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges." *Id.* at 19a. The court of appeals apparently agreed with the district court that this right was clearly established, summarily concluding that "[t]he district court was correct in denying qualified immunity to Hrvol and Richter for their acts before the filing of formal charges." *Ibid.*

SUMMARY OF ARGUMENT

I. This Court has interpreted Section 1983 to provide absolute immunity to prosecutors for activities "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976). The Court has done so because that immunity comports with the common law tradition and because the threat of liability could alter prosecutorial decisions and divert prosecutors' time and energy into defending civil suits instead of vindicating the criminal laws. *Id.* at 421-429.

If the allegations here are true, petitioners engaged in prosecutorial misconduct of an execrable sort, involving a complete breach of the public trust. But absolute immunity reflects a policy judgment that such conduct

is properly addressed not through civil liability, but through a host of other deterrents and punishments, including judicial oversight of criminal trials, and criminal and professional disciplinary proceedings against prosecutors. *Imbler*, 424 U.S. at 429. The Court has long held that, given these alternative tools, allowing criminal defendants to bring civil suits against prosecutors will produce few additional benefits and could cause serious harm.

What respondents seek here is, in every effect, a subversion of absolute prosecutorial immunity. To be sure, this Court has recognized that a prosecutor "neither is, nor should consider himself to be, an advocate"—and thus not absolutely immune—"before he has probable cause to have anyone arrested." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 274 (1993). But the Court has never said that a prosecutor can be liable for actions *at trial*, simply because they relate back to earlier conduct at the investigatory stage (*i.e.*, before probable cause is established). To do so would transform the absolute immunity of *Imbler* into little more than a pleading rule; plaintiffs barred under *Imbler* would simply draft their complaint to refer to the prosecutor's investigation and preparation of the case instead of his activity at trial.

II. Established law provides no support for finding prosecutors liable for alleged acts of fabrication at the investigatory stage. Courts agree that the act of fabrication, by itself, without any use of the evidence, is not a constitutional violation. Other constitutional torts, such as searches or seizures in violation of the Fourth Amendment, may be complete before trial, so a prosecutor could be liable for them. But to find a due process violation complete at the moment of fabrication would mean that any evidence generated by the government

anywhere (even if unused at trial) would give rise to a freestanding Section 1983 or *Bivens* suit. That holding would work a profound change in existing law.

Recognizing that difficulty, some courts have instead held liable the prosecutor who fabricates evidence because the fabrication can foreseeably result in the use of that evidence at trial to obtain a conviction. But this theory is also at odds with the Court's holdings. Section 1983 does not impose liability for all the foreseeable consequences of a state official's actions. The Constitution is not a "font of tort law," *Paul* v. *Davis*, 424 U.S. 693, 701 (1976), and this Court has rightly resisted such an unbounded reading of Section 1983. Instead, the Court has consistently looked to common law tort analogies to keep Section 1983 actions within proper bounds.

Those common law principles explain why prosecutors may not be held liable for fabricating evidence they introduce at trial, even though police officers who fabricate evidence may be held liable under Section 1983. The closest common law analogy here is malicious prosecution, which provides a remedy for the wrongful institution of criminal proceedings. The prosecutor is absolutely immune for that act. A police officer who fabricates evidence and supplies it for use at trial may be held liable at common law for the institution of proceedings, under a species of vicarious liability known as "procurement." But procurement has no application to prosecutors because they are already directly responsible—albeit immune—for the wrongful institution of proceedings and introduction of evidence there.

This is not mere formalism; it is an expression of longstanding and important policy. The common law limits of the malicious prosecution tort are the indispensable complement to the common law immunity of

prosecutors. Together, they provide the utmost protection to prosecutors in the performance of their official duties. And this strong common law protection is reflected in the Court's own precedents, which have consistently recognized the societal need for prosecutors to carry out their work "with courage and independence." *Imbler*, 424 U.S. at 423 (internal quotation marks and citation omitted).

Even with strong rules of prosecutorial immunity in place, injured parties retain several mechanisms for redress. Prosecutors may remain liable for any number of investigation-stage activities, as to which they enjoy only qualified immunity—for example, conducting searches and seizures that violate the Fourth Amendment. As noted above, police officers may be liable if they wrongfully procure criminal proceedings by supplying fabricated evidence that is used at trial to obtain a conviction. And on facts like those alleged here, a person who bears the title prosecutor, but who "perform[ed] [only] the investigative functions normally performed by a detective or police officer," *Buckley*, 509 U.S. at 273, would be liable. The exemption from liability in this case, although absolute, applies only to a discrete set of individuals for a discrete set of activities. That protection does no more than deliver on *Imbler*'s promise that prosecutors are absolutely immune from suit for bringing and presenting the State's case at trial.

Imbler's promise of absolute immunity becomes meaningless if any acquitted individual could pierce the prosecutor's protection by pleading that he was somehow involved in a pre-trial investigation. The common law has never recognized such a theory of liability, and because that theory would undermine the purposes of absolute prosecutorial immunity, the Court should not

do so now. If prosecutors are to be liable for their acts at trial, that result should be accomplished by Congress, and not read into either the longstanding statutory text of Section 1983 or the nonstatutory remedy that this Court implied in *Bivens*.

ARGUMENT

I. THIS COURT SHOULD REJECT RESPONDENTS' EFFORTS TO CIRCUMVENT ABSOLUTE IMMUNITY

By their own account, respondents' harm arose from the use of fabricated evidence at trial to convict them. In simplest terms, if that is the act that harmed respondents, and petitioners are immune for that act, then petitioners are not civilly liable to respondents. Even an unconscionable act of fabrication does not transform a prosecutor's acts at trial into a source of civil liability. As Judge Easterbrook observed on remand from this Court in *Buckley*, "*Obtaining* [a coerced] confession is not covered by immunity but does not violate any of Buckley's rights; *using* the confession could violate Buckley's rights but would be covered by absolute immunity." *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995).

Important public policies and common law traditions favor absolute prosecutorial immunity. Those same policies and traditions disfavor any artful attempt to evade that immunity.

A. The Use Of Fabricated Evidence Against A Criminal Defendant Violates The Defendant's Constitutional Rights, But A Prosecutor Is Absolutely Immune From Suit For Such Use

One potential theory of civil liability in this case—that petitioners' use of fabricated evidence at trial to

obtain convictions deprived respondents of their constitutional rights—fails because petitioners are absolutely immune.

The use of fabricated evidence against a criminal defendant "subjects [the defendant] to the deprivation of * * * rights * * * secured by the Constitution," 42 U.S.C. 1983. *E.g.*, *Briscoe* v. *LaHue*, 460 U.S. 325, 326 n.1 (1983) ("knowing use of perjured testimony violates due process"); *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942) ("perjured testimony, knowingly used by the State authorities to obtain [a] conviction" works "a deprivation of rights guaranteed by the Federal Constitution"). The United States can bring criminal charges against a prosecutor who knowingly presents such fabricated testimony, see 18 U.S.C. 242, or conspires with a witness or police officer to do so, see 18 U.S.C. 241.

A prosecutor, however, may receive absolute immunity from suit for acts violating the Constitution in order to advance important societal values. This Court's cases recognize a common law tradition of immunity that ensures that prosecutors are free to carry out their work "with courage and independence." *Imbler* v. *Pachtman*, 424 U.S. 409, 423 (1976) (internal quotation marks and citation omitted). Without a strict rule of immunity, "suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of some improper and malicious actions to the State's advocate." *Id.* at 425. Such suits raise the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. These suits are particularly vexing

because "allegations of [prosecutorial] misconduct are 'easy to allege and hard to disprove.'" *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) (quoting *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004)). Moreover, they "often would require a virtual retrial of the criminal offense in a new forum." *Imbler*, 424 U.S. at 425. Absolute immunity inevitably includes wrongdoers within the scope of its protection because of the paramount need to achieve broad societal goals. In effect, the doctrine "reflects 'a balance' of 'evils'"—where the benefits of fearless prosecution outweigh the cost of immunizing wrongful conduct. *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 859 (2009) (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.), cert. denied, 339 U.S. 949 (1950)).

Under these principles, "prosecutors are absolutely immune from liability under [Section] 1983 for their conduct in 'initiating a prosecution and in presenting the State's case.'" *Burns* v. *Reed*, 500 U.S. 478, 486 (1991) (quoting *Imbler*, 424 U.S. at 431); see *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring) ("Insofar as [petitioner's false-evidence claims] are based on respondents' supposed knowing *use* of fabricated evidence[,] * * * immunity provides complete protection."). By virtue of this rule, petitioners have absolute immunity from civil suit for the use at trial of any evidence, and therefore cannot be held liable for their introduction at trial of allegedly fabricated evidence in this case.

B. *Imbler*'s Promise Of Absolute Prosecutorial Immunity Can Be Vindicated Only By Rejecting Respondents' Novel Theory Of Prosecutorial Liability

Absolute immunity would mean very little if, as respondents propose, they have a cause of action for the same harm (imprisonment on conviction), flowing from the same act (introduction of fabricated evidence), against the same defendant (the prosecutor), that would usually trigger immunity, so long as pled with the spotlight on an earlier action (the initial fabrication). The fundamental flaw with that approach is that it allows an allegation relating to the earlier action, which does not itself produce the harm complained of and could not itself form the basis of suit, to alter the result in the case. That would render prosecutorial immunity close to an empty shell, which plaintiffs would take into account only for the purpose of pleading around it. As Justice Kennedy observed in *Buckley*, a prosecutor would not be able to invoke absolute immunity if "the claimant is clever enough to include some actions taken by the prosecutor prior to the initiation of prosecution." 509 U.S. at 287 (Kennedy, J., concurring in part and dissenting in part). That is precisely what respondents have done here to powerful effect, even though the earlier actions cannot give rise to liability and so are not the gravamen of their complaints.

In the analogous context of considering claims of qualified immunity, this Court has emphatically rejected attempts at artful pleading to evade the "balance that [the Court's] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (quoting *Davis* v.

Scherer, 468 U.S. 183, 195 (1984)). Here, delivering on the promise of *Imbler* requires rejecting respondents' attempts to plead around absolute immunity. The "vigorous and fearless performance of the prosecutor's duty," *Imbler*, 424 U.S. at 427, would be impossible if that immunity could be evaded so easily. In any case in which a prosecutor was involved in an investigation—for example, in interviews of witnesses—he might at trial be "hampered in exercising [his] judgment as to the use of such witnesses by concern about resulting personal liability." *Id.* at 426. And conversely, he might be deterred from becoming involved in pre-trial investigation in the first instance lest that involvement, coupled with the fear of liability, distort his judgments about what evidence to use at trial. The rule respondents seek would undermine *Imbler*'s protections and threaten to undermine, in just the way that decision sought to avoid, the effectiveness and integrity of criminal investigations and trials.

Critical to this analysis is that respondents have no cause of action for the non-immunized (wholly pre-trial) conduct of fabrication that their complaints allege. See pp. 13-33, *infra*. Section 1983 absolute immunity doctrine presupposes that some acts need not be immunized because they do not give rise to liability in the first instance. See, *e.g.*, *Buckley*, 509 U.S. at 275 n.5 (warning against "conflat[ing] the question whether a [Section] 1983 plaintiff has stated a cause of action with the question whether the defendant is entitled to absolute immunity for his actions").[2] Complaints based on such acts

[2] The difference between the immunity question and the cause-of-action question is also evident in *Kalina* v. *Fletcher*, 522 U.S. 118 (1997). There, the Court held that a prosecutor has only qualified immunity for swearing a false affidavit supporting an arrest warrant application—the

fail to state a claim—or, if they are really about other acts that would give rise to a claim but are immunized, the complaints should be dismissed on that basis. That is the case here. Respondents could not omit from a well-pleaded complaint an allegation that the fabricated evidence was introduced at trial to obtain their convictions; that fact is essential to show the causal connection between the fabrication and the actual harm they suffered, which was imprisonment on conviction. But respondents are absolutely immune for that critical act of introducing the evidence. If *Imbler* is to have any force, it must be read to exempt prosecutors from liability in such a situation, when the substance of the claim rests on an immune act, regardless of how artful the complaint is in avoiding its mention.[3]

II. PETITIONERS ARE NOT LIABLE UNDER SECTION 1983 FOR FABRICATION OF EVIDENCE BEFORE TRIAL

The decision below rested on one of two possible theories, but was vague as to which one it employed. It

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Court did not hold that there is a Section 1983 cause of action against the prosecutor for that act.

[3] A complaint is also subject to Federal Rule of Civil Procedure 8, which demands that it "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). However the Court decides this case, *Iqbal* should ensure the dismissal of complaints that "do not permit the court to infer more than the mere possibility of misconduct," *id.* at 1950. But that protection is no substitute for a proper interpretation of Section 1983 that prevents plaintiffs from circumventing prosecutorial immunity. Some plaintiffs will succeed in meeting the pleading standard; and in any event, this Court has never suggested that pleading requirements are an adequate substitute for categorical exemption from liability.

stated its holding as "immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges." Pet. App. 19a. This statement suggests that the Court found a violation of Section 1983 based solely on petitioners' pre-trial conduct. Yet the opinion below also relied on *Zahrey* v. *Coffey*, 221 F.3d 342 (2d Cir. 2000), which reasoned instead that the reasonably foreseeable causal connection between fabrication of evidence and its use at trial is a sufficient basis for imposing liability on a prosecutor. See Pet. App. 18a (liability is appropriate "provided that the deprivation of liberty . . . can be shown to be the result of [the prosecutor's] fabrication") (quoting *Zahrey*, 221 F.3d at 344, 349) (brackets in original).

Neither theory is sound. Courts have never recognized a freestanding due process right against fabrication of evidence. A defendant's due process right relating to fabrication kicks in only at trial, when such evidence is introduced in court. So, too, *Zahrey*'s foreseeability reasoning would profoundly alter existing law. That theory would import into Section 1983, in an entirely novel way, generalized notions of causation. At the same time, it would disregard specific common law doctrine relevant to the question—namely the tort of malicious prosecution and its limits.

A. Fabrication Of Evidence During An Investigation Does Not, By Itself, Violate The Constitution

The first step in an immunity case under Section 1983 is to identify the constitutional right allegedly infringed. *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979). Here, petitioners' fabrication of evidence, by

itself, cannot be the constitutional violation on which liability is based.

1. Courts broadly agree that fabrication of evidence, standing alone, does not violate any constitutional right of a criminal defendant (regardless whether it may violate someone else's). See, *e.g.*, *Michaels* v. *New Jersey*, 222 F.3d 118, 123 (3d Cir. 2000), cert. denied, 531 U.S. 1118 (2001); *Zahrey*, 221 F.3d at 348 ("The manufacture of false evidence, 'in and of itself,' * * * does not impair anyone's liberty, and therefore does not impair anyone's constitutional right.") (citation omitted); *Buckley*, 20 F.3d at 794-795 (Easterbrook, J.) ("Coercing witnesses to speak * * * is a genuine constitutional wrong, but the persons aggrieved would be [the coerced witnesses] rather than Buckley. * * * *Obtaining* the confession [from other people] is not covered by immunity but does not violate any of Buckley's rights."); *Landrigan* v. *City of Warwick*, 628 F.2d 736, 744 (1st Cir. 1980) ("[W]e do not see how the existence of a false police report, sitting in a drawer in a police station, by itself deprives a person of a right secured by the Constitution and laws."). Cf. *Hartman*, 547 U.S. at 262 n.9 ("No one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort.").

Although *Buckley*, 509 U.S. at 272, reserved the question, every Member of this Court suggested that the distinction between the preparation and the use at trial of fabricated evidence has constitutional significance. "I am aware of[] no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Id.* at 281 (Scalia, J., concurring); see *id.* at 271-272 ("The location

of the injury [as between trial and investigation] may be relevant to the question whether a complaint has adequately alleged a cause of action for damages."); *id.* at 275 n.5 (same); *id.* at 285 (Kennedy, J., concurring in part and dissenting in part) ("Indeed, it appears that the only constitutional violations these actions are alleged to have caused occurred within the judicial process."). This view accords with this Court's understanding of other trial rights. For example, "[s]tatements compelled by police interrogations of course may not be used against a defendant at trial, * * * but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs." *Chavez* v. *Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion); see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

2. Contradicting these authorities, the court of appeals held that "a County Attorney * * * violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence *before* filing formal charges." Pet. App. 19a (emphasis added). This Court has been "reluctant to expand the concept of substantive due process," *Collins* v. *City of Harker Heights*, 503 U.S. 115, 125 (1992), and the right articulated by the court of appeals cannot be squared with this Court's jurisprudence.

The Due Process Clause states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1; accord *id.*, Amend. V. A due process violation requires, *inter alia*, a cognizable deprivation of life, liberty, or property. Absent such a deprivation, there is no violation. See, *e.g.*, *District Attorney's Office* v. *Osborne*, 129 S. Ct. 2308, 2319 (2009). When a state actor merely fabricates evidence—without putting that evidence to

use in any way—the requisite deprivation of life, liberty, or property is missing. And even if some deprivation were found, a right against unused fabricated evidence does not have a sufficiently "long history" of recognition, and is not "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 2322, 2320 (quoting *Medina* v. *California*, 505 U.S. 437, 446 (1992)). Similarly, the mere creation of false evidence—assuming it sits unused in some police file or government archive—is hardly conduct that "shocks the conscience." See *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846-850 (1998).[4]

Indeed, because the decision below does not rely on any particular use of false evidence, it appears to go far toward constitutionalizing simple precepts of honest public record-keeping. Every police or investigatory report, even though filed away without further action, could rise to the level of a constitutional injury upon a showing that some information in the report was knowingly false, or that public officials had failed to correct it on demand. The cause of action would lie even though the inaccuracies resulted in no concrete harm or, if the false records were released, only a generalized reputational injury. Yet this Court has long held that such inchoate interests are "neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *Paul* v. *Davis*, 424 U.S. 693, 712 (1976).

The novel pre-trial right that the court of appeals posited finds no support in previously recognized consti-

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[4] Although mere fabrication of evidence, without more, does not violate the Constitution, and therefore could not be prosecuted under 18 U.S.C. 242, it may support a prosecution under 18 U.S.C. 241 if the prosecutor conspired to use the fabricated evidence to injure another person in violation of the Constitution.

tutional rights applying to criminal investigations. One such right arises from the Fourth Amendment, whose violation—an arrest or search without probable cause—usually is complete before trial. See *Wallace* v. *Kato*, 549 U.S. 384, 390 n.3 (2007). Thus, a prosecutor committing such a violation at the investigatory stage would be liable under Section 1983, subject only to a defense of qualified immunity. See *Buckley*, 509 U.S. at 273. But the mere fabrication of evidence is not a Fourth Amendment violation, because an act of fabrication is not a search or seizure. See *California* v. *Hodari D.*, 499 U.S. 621 (1991). Neither is the fabrication of evidence assimilable to any other known pre-trial constitutional violation. Because this is so, regardless of the identity of the defendant, any recovery by respondents under Section 1983 must be for a harm suffered at a later stage of their prosecution, when the fabricated evidence was used against them at trial.

B. Generalized Notions Of Foreseeability Provide No Basis For Section 1983 Liability For Fabrication Of Evidence

Rather than finding a complete constitutional deprivation before trial, *Zahrey* based Section 1983 liability on the reasonable foreseeability that fabricated evidence will be used at trial to obtain a conviction. 221 F.3d at 351-354. The court reasoned "that [S]ection 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" *Id.* at 349-350 (quoting *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961)).

Zahrey's "reasonable foreseeability" principle is wrong for at least three reasons. *First*, *Zahrey* reads too much into this Court's statement in *Monroe*. That observation was offered to suggest that Section 1983

carries no scienter requirement.[5] This feature was relevant in *Monroe* to distinguish Section 1983 from 18 U.S.C. 242: both concern the deprivation of constitutional rights under color of law, but unlike Section 1983, 18 U.S.C. 242 reaches only "willful[]" deprivations of rights. The Court's rejection of a scienter requirement says nothing about causation of the kind on which the Second Circuit relied, and certainly does not imply a freewheeling "reasonably foreseeable" standard applicable to all Section 1983 cases.

Second, this Court has squarely rejected a reading of the Due Process Clause that makes state actors liable for all foreseeable consequences of their actions. See *Martinez* v. *California*, 444 U.S. 277, 284-285 (1980) (parolee's killing of plaintiff's decedent not state action "[r]egardless of whether * * * the state parole board could be said either to have had a 'duty' to avoid harm to his victim or to have proximately caused [plaintiff's decedent's] death") (citing *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339 (1928)). A rule of mere foreseeability would effectively convert the Constitution and Section 1983 into the "font of tort law," *Paul*, 424 U.S. at 701, that this Court has long resisted. See, *e.g.*, *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986) ("Our Constitution * * * does not purport to supplant traditional tort law

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[5] Notably, the Court has limited even this aspect of *Monroe* in cases like *Daniels* v. *Williams*, 474 U.S. 327 (1986) (negligent deprivations of life, liberty, or property do not violate the Due Process Clause), *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) (only deliberate indifference to serious medical needs, and not negligence such as the mere failure to provide medical care, implicates Eighth Amendment prohibition against cruel and unusual punishments), and *Brower* v. *County of Inyo*, 489 U.S. 593, 596 (1989) (only intentional conduct rises to the level of a seizure under the Fourth Amendment).

in laying down rules of conduct to regulate liability for injuries that attend living together in society.").

Third, even if *Zahrey* were correct that Section 1983 sometimes incorporates a general tort rule of proximate causation, the cause of action here is informed by the more specific parameters of the common law tort of malicious prosecution, as discussed below. Indeed, the common law expressly rejects ordinary causation principles in describing procurement, which is the kind of malicious prosecution relevant here. See p. 25, *infra* (quoting Restatement (Second) of Torts § 653 cmt. d (1977) (Restatement)). The more specific rule of the common law supersedes any general background principle of proximate causation.

C. A Prosecutor Who Is Immune From Suit For Use Of Fabricated Evidence At Trial Is Not Liable Under Section 1983 For Fabrication Of That Evidence Before Trial

Both *Zahrey* and the decision below began with the premise that a police officer who fabricates evidence may be liable under Section 1983 when that evidence is later used "to procure a conviction." Pet. App. 18a (citation omitted); see *Zahrey*, 221 F.3d at 351-352. From there, both courts reasoned that it would be "perverse" to hold that a prosecutor who engages in the identical fabrication could nonetheless be free from liability. Pet. App. 18a; see *Zahrey*, 221 F.3d at 353.

Both courts of appeals misunderstood why and when a police officer who fabricates is liable. A fabricating officer is liable under Section 1983 under a form of vicarious liability. As discussed above, he is not liable because the fabrication itself is a constitutional violation. Neither is he liable because the fabrication may foreseeably be used to secure a conviction. He is liable because

the introduction of the fabricated evidence at trial is a constitutional violation, and even though he personally did not commit this violation, his earlier act of fabrication was its animating force. That connection—between the initial fabrication and the subsequent corruption of criminal proceedings—makes him an appropriate person to bear responsibility.

This is precisely the logic of the common law in holding liable a person who wrongfully procures the institution of criminal proceedings—a species of the tort of malicious prosecution. Liability for procurement is not predicated on the simple act of fabricating the evidence; if there were no subsequent use of the evidence, there would be no liability. Liability for procurement arises from the later use of the evidence—even though the procurer himself only has fabricated the evidence, and has not used it. Once again, the liability is vicarious: The common law treats the fabricator as responsible for the subsequent use of the evidence because his fabrication "procured" the criminal proceedings in the first instance. Section 1983 liability for a fabricating police officer works in just the same way.

This explanation of the common law reveals why the court of appeals' reasoning—of simply substituting the fabricating prosecutor in place of the fabricating officer—must fail. The procurement theory cannot be at issue in this case, because the prosecutor *did* introduce the evidence—and is absolutely immune from suit for doing so. It is both a misuse of language and a misunderstanding of doctrine to speak of a prosecutor procuring his own institution of proceedings; he in fact initiated the proceedings, rather than procuring them. Everyone agrees the prosecutor is immune for this initiation of proceedings. To impose a form of vicarious liability for

it, when the law chooses not to impose direct liability, would be anomalous.

1. Common law malicious prosecution informs an action brought under Section 1983 seeking damages for unconstitutional confinement imposed pursuant to legal process

This Court has "repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability." *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994) (quoting *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 305 (1986)). The specific rules of the common law define the reach of that tort liability.

> "[O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under [Section] 1983 as well."

Ibid. (first set of brackets in original) (quoting *Carey* v. *Piphus*, 435 U.S. 247, 257-258 (1978)). This court has "reemphasize[d] that [its] role is to interpret the intent of Congress in enacting [Section] 1983, not to make a freewheeling policy choice, and that [it is] guided in interpreting Congress' intent by common-law tradition." *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986).

In *Heck*, the plaintiff, who was confined following a criminal conviction, alleged that the state police investigator and county prosecutors handling his case "had engaged in an unlawful, unreasonable, and arbitrary investigation leading to [his] arrest; knowingly destroyed evidence which was exculpatory * * *; and

caused an illegal and unlawful voice identification procedure to be used at [his] trial." 512 U.S. at 479 (internal quotation marks omitted). Heck sought money damages for his allegedly wrongful imprisonment. *Ibid.*

Aside from the factual particulars of the allegations, respondents' legal claims under Section 1983 are indistinguishable from Heck's. Thus, as in *Heck*, "[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because * * * it permits damages for confinement imposed pursuant to legal process." 512 U.S. at 484.

This Court has likewise looked to the common law of malicious prosecution in recognizing immunities in cases seeking damages for allegedly unconstitutional confinement pursuant to legal process. For example, in *Malley*, the Court held that an officer is not absolutely immune under Section 1983 for presenting an insufficient affidavit to a judicial officer who issued a warrant resulting in the plaintiff's arrest. The Court implied that the police officer "could be held liable," *Malley*, 475 U.S. at 340, and referred to nineteenth century common law malicious prosecution cases, see *id.* at 341 n.3. See also *Kalina*, 522 U.S. at 124 & n.11 (noting that *Imbler* "rel[ied] on common-law decisions providing prosecutors with absolute immunity from tort actions based on claims that the decision to prosecute was malicious and unsupported by probable cause" and "drew guidance from * * * the first American cases addressing the availability of malicious prosecution actions against public prosecutors").

2. By analogy to common law malicious prosecution, a police officer who fabricates evidence may be liable for deprivation of a criminal defendant's constitutional rights when the evidence is used at trial

The core concern of the tort of malicious prosecution is that criminal prosecution not be wrongfully coopted and put to improper ends. Because that is so, the central event for the tort is the institution of criminal proceedings. Restatement § 654. Under the common law, a person may be liable for malicious prosecution if, *inter alia*, he either "*initiates* or *procures* the institution of criminal proceedings" against another. *Id.* § 653 (emphasis added). In other words, a malicious prosecution claim can proceed on a theory of primary liability (initiation) or vicarious liability (procurement).

a. Generally, a person "initiates" criminal proceedings if he "mak[es] a charge before a public official or body in such form as to require the official or body to determine whether process shall or shall not be issued against the accused." Restatement § 653 cmt. c. That cannot be the basis for Section 1983 liability here because such initiating acts, when undertaken by a prosecutor, are afforded absolute immunity. See *Imbler*, *supra*; *Kalina*, *supra*. By contrast, a police officer who applies for and obtains a warrant by swearing out a false or insufficient affidavit may be liable for wrongful initiation. See *Malley*, 475 U.S. 240-241 & n.3; Restatement § 653 cmt. c ("[O]ne who * * * presents to a magistrate a sworn charge upon which a warrant of arrest is issued, initiates the criminal proceedings of which the issuance of a warrant is the institution.").

b. A person can also be liable for malicious prosecution by "procuring" criminal proceedings. There, "[i]t is

not necessary to liability * * * that the defendant personally or through an agent shall have made the formal charge upon which the proceedings were instituted. It is enough that he has induced a third person"—often the prosecutor—"to make the charge." Restatement § 653 cmt. f. The procurement theory recognizes that persons other than the formal initiator may bear responsibility for a prosecution. Cf. *Perdu* v. *Connerly*, 24 S.C.L. (Rice) 48, 52 (1838) (malicious prosecution action) ("The defendant is liable for [a third party's] act, as done by his procurement; for, in trespass, all who are concerned in any way are principals."). It is on this theory that a fabricating officer may be liable for the deprivation of liberty caused by a conviction obtained with his fabricated evidence.

The standard requirements for procurement, however, are stricter than simple foreseeability:

> It is, however, not enough that some act of his should have caused the third person to initiate the proceedings. * * * The giving of the information or the making of the accusation * * * does not constitute a procurement of the proceedings that the third person initiates if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit.

Restatement § 653 cmt. d; see *id.*, cmt. g.[6]

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[6] The procurement theory may therefore require a certain relationship between the procuring party and the instituting party. For example, the courts of appeals have most often invoked a procurement theory of liability when a police officer dupes the prosecutor by supplying fabricated evidence, while concealing the fabrication. See p. 26, *infra* (citing cases). Likewise, the Restatement suggests coercion of the prosecutor would support a procurement theory of liability. See Restatement § 653 cmt. g & ill. 4. A conspiracy between officer and

Once a person is found to have procured the criminal proceedings, that person is liable as if he himself initiated those proceedings. "[O]ne who procures a third person to institute criminal proceedings against another is liable under the same conditions *as though he had himself initiated the proceedings.*" Restatement § 653 cmt. d (emphasis added). Colloquially speaking, the procurer stands in the shoes of the initiator.

Thus, lower courts have held that a police officer who, without the prosecutor's knowledge, fabricates evidence may be held liable under Section 1983 because, by analogy to malicious prosecution law, the officer has procured the liberty deprivation. See, *e.g.*, *Senra* v. *Cunningham*, 9 F.3d 168, 174 (1st Cir. 1993); *Barts* v. *Joyner*, 865 F.2d 1187, 1195 (11th Cir.), cert. denied, 493 U.S. 831 (1989); *Jones* v. *City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988); *Smiddy* v. *Varney*, 665 F.2d 261, 266 (9th Cir. 1981), cert. denied, 459 U.S. 829 (1982).[7] In effect, the police officer stands in the shoes of the prosecutor.

White v. *Frank*, 855 F.2d 956 (2d Cir. 1988), offers a particularly careful application of these principles. There, the court of appeals considered whether the defendant police officers could be liable under Section 1983 for perjury before a grand jury, which resulted in the plaintiff's indictment, arrest, prosecution, and conviction. The court held that officers were absolutely im-

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prosecutor may also support a procurement theory of officer liability, as may anything that makes "an intelligent exercise of the [prosecutor's] discretion * * * impossible," *id.* cmt. g.

[7] These cases and others exhibit some diversity of opinion on the particular circumstances justifying liability of fabricating officers. Because the police who investigated respondents are not parties here, the Court need not confront those issues.

mune from liability for the act of testifying falsely in a judicial proceeding—an act of fabrication—because at common law, their false statements would have been absolutely privileged. *Id.* at 958-959 (citing *Briscoe*, *supra*). But, the court continued, officers could be held liable at common law for presenting false statements to a grand jury considering whether to return an indictment. There, the law provided an entirely separate "cause[] of action"—to wit, "an action for malicious prosecution," on which the officers might be "liable for [their] role in *initiating* a baseless prosecution." *Id.* at 959; see *id.* at 961; see also *Kalina*, 522 U.S. at 133-134 (Scalia, J., concurring) (employing similar analysis). For that reason, *White* imposed Section 1983 liability.

In short, a police officer who fabricates evidence is not liable under Section 1983 for the conduct of fabricating the evidence itself (*e.g.*, suborning perjury or testifying falsely). Rather, the fabricating officer may be liable for his role in instituting wrongful proceedings, including the presentation of false evidence to the prosecutor for use at trial. This is so even though he plays no role in actually introducing that evidence at trial, because procuring the prosecution with the fabricated evidence itself justifies holding him liable.

c. Before this case, the Court's closest encounter with the procurement theory of liability in a Section 1983 or *Bivens* case occurred in *Hartman*, *supra*, where the plaintiff sought to hold investigators liable for a retaliatory prosecution. The Court first noted that a "*Bivens* (or [Section] 1983) action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute." *Hartman*, 547 U.S. at 261-262 (citing *Imbler*, *supra*). Rather, in *Hartman*, "the defendant [was] a

nonprosecutor * * * who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 262. In that situation, the Court explained, "the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute," *ibid.*, which the Restatement labels "procurement" in the context of malicious prosecution.

This Court not only recognized in *Hartman* that procurement was the operative theory, but also fashioned a test virtually identical to that of the Restatement. Compare *Hartman*, 547 U.S. at 262 (plaintiff "must show that the nonprosecuting official * * * induced the prosecutor to bring charges that would not have been initiated without his urging"), with Restatement § 653 cmt. g ("In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution."). *Hartman* thus supports analyzing liability for fabricating police officers under Section 1983 by analogy to common law actions for procuring wrongful prosecutions.

3. By analogy to common law malicious prosecution, a prosecutor who fabricates evidence and introduces it at trial is not liable under Section 1983

Once the common law backdrop is understood, the distinction between a fabricating police officer and a fabricating prosecutor becomes evident. Contrary to the court of appeals' view, the one cannot be substituted for the other. That is because the wrongful act at common law is instituting proceedings based on fabricated evi-

dence. While the fabricating officer may be vicariously liable for that act, the prosecutor is always immune for it.

a. By analogy to common law malicious prosecution, a fabricating officer may be held liable on an "initiation" or "procurement" theory—and if petitioners are liable, it likewise must be on one of these theories. But this extrapolation, from officer to prosecutor, cannot be accomplished. Liability on an initiation theory cannot translate to the prosecutor, because he is absolutely immune for initiating a prosecution. And the procurement theory fares no better. As suggested above, procurement liability for malicious prosecution exists to assign liability to a blameworthy person for wrongful institution of a proceeding actually performed by another. The theory is irrelevant when the blameworthy person and the initiator of the proceeding are one and the same.[8] Here, the initiator—the trial prosecutor—is the only person responsible for the wrongful act of proceeding with a corrupt case: to use an earlier metaphor, the prosecutor *already* stands in his own shoes.

Or to put the point in another way, the procurement theory is a tool for assigning liability to non-prosecutors—not a theory (as respondents would have it) for creating liability for prosecutors. As to prosecutors, the responsibility for the wrongful conduct is already clear —but so too is the absolute immunity for it. Indeed, the initiation of a wrongful action, of which fabrication of evidence is a simple component, is the prototypical con-

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[8] Similarly, none of the relationships between police officer and prosecutor that justify procurement liability, see note 6, *supra*, can exist when the prosecutor both fabricates and introduces the evidence. A person acting alone cannot dupe himself, coerce himself, conspire with himself, or impair his own discretion.

duct for which prosecutors receive protection. See *Dellums* v. *Powell*, 660 F.2d 802, 806 (D.C. Cir. 1981) ("Never has a prosecutorial official been held liable for causing a prosecution to be brought" even based on "actions taken in an administrative or investigative capacity.").

b. This is exactly the result reached in *Yaselli* v. *Goff*, 12 F.2d 396 (2d Cir. 1926), aff'd, 275 U.S. 503 (1927) (per curiam), which this Court summarily affirmed and has repeatedly cited with approval. See *Imbler*, 424 U.S. at 422, 424; *Butz* v. *Economou*, 438 U.S. 478, 509-510 (1978); *Burns*, 500 U.S. at 490. In *Yaselli*, the plaintiff brought a malicious prosecution claim against a Special Assistant to the Attorney General, alleging that the prosecutor had obtained the indictment against him by presenting false evidence to the grand jury. The court of appeals held that the prosecutor was absolutely immune. But the court went on to address plaintiff's "novel question, which ha[d] not * * * before been presented to the courts": Whether the prosecutor could be held liable instead for conspiring to be appointed a Special Assistant in order to prosecute the plaintiff without probable cause. *Yaselli*, 12 F.2d at 406. *Yaselli* rejected the earlier conspiracy as irrelevant, and explained that "[t]he important fact is that * * * having been appointed, the public interests require that he shall be free and fearless to act in the discharge of his official duties." *Id.* at 407. The same logic applies in this case: All the wrongful conduct is of a single piece—the wrongful institution and conduct of a criminal proceeding—for which the prosecutor is absolutely immune.

Yaselli's refusal (see 12 F.2d at 407) to follow *Stewart* v. *Cooley*, 23 Minn. 347 (1877), is particularly relevant. *Stewart* had suggested that a judge who procured

a prosecution that came before his own court could not invoke judicial immunity against an action for malicious prosecution. The *Stewart* court reasoned that "such a conspiracy, previously formed * * * would subject all the parties engaged in it to liability" because "[t]he act of entering into such an agreement was not done in the course of any judicial proceeding, or in the discharge of any judicial function or duty." *Id.* at 351. Plaintiff's counsel in *Yaselli* pointed to *Stewart* for the proposition that "a wrongdoer cannot become immune by the successful accomplishment of part of the wrong which enables him to do the rest." 12 F.2d at 407. That counsel's argument, and the reasoning in *Stewart*, are precisely the mistaken views adopted by *Zahrey* and respondents here. *Yaselli* rejected that procurement-based argument because the relevant "wrongful act on the part of the judge"—that is, the act on which tort liability is predicated—"consisted in the issuing of process," an act for which there is absolute immunity. *Ibid.* (quoting 2 Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independently of Contract* 801 n.23 (3d ed. 1906)). Much the same is true of this case, where the prosecutor's pre-trial fabrication is part and parcel of the wrongful initiation of proceedings on which tort liability is predicated—and for which the prosecutor is absolutely immune.

D. Imposing Section 1983 Liability On Prosecutors Is Unwarranted On Policy Grounds Because Criminal Defendants Have Alternative Civil Remedies And Adequate Safeguards Exist Against Prosecutors' Illegal Behavior

If the allegations in this suit are true, petitioners' efforts to convict respondents constitute a reprehensible breach of public trust. But providing absolute immunity

in such a case will not "leave the public powerless to deter misconduct or to punish that which occurs." *Imbler*, 424 U.S. at 429. Prosecutions under 18 U.S.C. 242, "the criminal analog of [Section] 1983," can punish wrongdoers, as can prosecutions for perjury. *Imbler*, 424 U.S. at 429. Furthermore, rigorous discipline by the bar association is a potent tool for ensuring that prosecutors live up to the responsibilities of their office. See *id.* at 429 & n.30. Indeed, the "prosecutor stands perhaps unique * * * in his amenability to professional discipline." *Id.* at 429. Criminal defendants are likewise protected by "'[t]he safeguards built into the judicial system'" as a "check on prosecutorial actions." *Burns*, 500 U.S. at 492 (quoting *Butz*, 438 U.S. at 512). See generally Gov't Br. at 31-33, *Van de Kamp*, *supra* (No. 07-854) (discussing safeguards).

Providing absolute prosecutorial immunity in this case also will not mean that respondents, or those in their position, are without a civil remedy. A police officer who fabricates evidence introduced at trial may be liable under Section 1983. Likewise, a "prosecutor" who "perform[ed] [only] the investigative functions normally performed by a detective or police officer," *Buckley*, 509 U.S. at 273, would be liable on the same facts. See pp. 24-28, *supra*. Both prosecutors and police officers, moreover, may be liable under various state tort law theories (*e.g.*, intentional infliction of emotional distress, negligence) if they were acting outside the scope of their employment. See, *e.g.*, Pet. App. 16a (remanding for further proceedings on such a claim). Similarly, a State may waive sovereign immunity under a state tort claims act for actions taken within the scope of a state official's

employment.[9] In addition, a wrongfully convicted criminal defendant who is later exonerated may have a statutory right of compensation.[10]

Consequently, a decision favoring petitioners would hardly ever deny any recovery to a wronged party. By contrast, a decision favoring respondents, by allowing their cause of action, would undo absolute immunity doctrine, with untold social costs. In the exceedingly rare case in which provable wrongdoing by a prosecutor is left uncompensated, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Imbler*, 424 U.S. at 428 (quoting *Gregoire*, 177 F.2d at 581 (L. Hand, J.)).

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[9] Iowa bars all malicious prosecution claims against state employees acting within the scope of their employment. Iowa Code Ann. § 669.14.5 (West 1998). By contrast, the Federal Tort Claims Act waives sovereign immunity for malicious prosecution claims against investigative and law enforcement officers of the United States. See 28 U.S.C. 2680(h).

[10] See 28 U.S.C. 1495, 2513; Ala. Code § 29-2-156 (2003); Cal. Penal Code § 4904 (2000); 735 Ill. Comp. Stat. Ann. 5/2-702 (West Supp. 2009); 705 Ill. Comp. Stat. Ann. 505/8 (West 2007); Iowa Code Ann. § 663A.1 (West 1998); La. Rev. Stat. Ann. § 15:572.8 (West 2005); Maine Rev. Stat. Ann. tit. 14, § 8241 (West 2003); N.J. Stat. Ann. § 52:4C-1 (West 2001); Ohio Rev. Code Ann. § 2743.48 (West 2000); Okla. Stat. Ann. tit. 51, § 154.B (West 2008); Tex. Civ. Prac. & Rem. Code Ann. § 103.001 (Vernon 2005); Va. Code Ann. § 8.01-195.11 (West 2009); Wis. Stat. Ann. § 775.05 (West 2009).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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